SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1246 1244

BENJAMIN H. SAUNDERS,
Executor of the Estate of Sophus Dee Hanson, deceased,

and

BARBARA ELIZABETH HANSON,
Sole Heir and Residuary Legatee under the Will of
Sophus Dee Hanson, deceased,

Petitioners,

v.

ANNE BAKER BEIN HANSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioners pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on December 26, 1963, and a denial of Petition for Rehearing entered on February 28, 1964.

OPINION BELOW

The opinion of the United States District Court for the District of Columbia is reported at 210 F. Supp. 377. The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed in Appendix A hereto, infra p. 1a, is reported at 327 F. 2d 889. —U.S. App. D.C. —.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254.

QUESTIONS PRESENTED

1. Where the putative widow elects to take against the Will of her deceased husband and claim her intestate share of the estate, do the executor of the deceased husband and/or the sole heir at law and residuary legatee under the Last Will and Testament of the deceased husband have the legal standing or capacity to demonstrate the invalidity of the putative widow's marriage to the decedent by showing that at the time of said marriage she was not validly divorced from an earlier husband because such divorce is not entitled to full faith and credit in the District of Columbia?

2. Does a divorce decree in favor of the innocent husband abate because of his death prior to the expiration of a six month statutory waiting period, so as to give his divorced spouse the right to claim a statutory share in his estate, where the decree is final in all respects except for the passage of time? If so, do the findings in said decree constitute res judicata and judgment by estoppel against the decedent and his privies in a contest over the rights to his estate?

CONSTITUTION AND STATUTES INVOLVED

U.S.C.A. Const., Art. 4, § 1

"Section 1. Full Faith and Credit shall be given in each State to the public Arts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Title 16, Section 421, District of Columbia Code, 1961

"§ 16-421. When decree for annulment or absolute divorce effective.

"No final decree annulling or dissolving a marriage shall be effective to annul or dissolve the marriage until the expiration of the time allowed for taking an appeal, nor until the final disposition of any appeal taken, and every final decree shall expressly so recite. Every decree for absolute divorce shall contain the date thereof and no such final decree shall be absolute and take effect until the expiration of six months after its date. (Mar. 3, 1901, ch. 854, § 983a, as added Apr. 19, 1920, 41 Stat. 567, ch. 153, § 1, and amended Aug. 7, 1935, 49 Stat. 540, ch. 453, § 4.)"

Title 18, Section 211, District of Columbia Code, 1961

"§18-211. Renunciation of devises and bequests to spouse — Form. — Limitation—Interest to be taken by widow upon such renunciation.

"Subject to the provisions of section 18-212, a widow or widower shall be barred of any rights or interest she or he may have in real or personal estate by any such devise or bequest unless within six months after administration may be granted on the deceased spouse's estate she or he shall file in the probate court a written renunciation to the following effect:

I, A.B., widow or widower of .....
late of ....., deceased, do hereby renounce and quit all claim to any devise or bequest

made to me by the last will of my husband or wife exhibited and proved according to law; and I elect to take in lieu thereof my legal share of the real and personal estate of my said spouse.

If, during said period of six months, a suit should be instituted to construe the will of the husband or wife, the period of six months for the filing of such renunciation shall commence to run from the date when such suit shall be finally determined, by appeal or otherwise.

By renouncing all claim to any and all devices and bequests, made to her or him by the will of her husband or his wife, the surviving spouse shall be entitled to such share or interest in the real and personal estate which she or he would have taken had the deceased spouse died intestate. Except in cases of valid antenuptial or postnuptial agreements, and except in cases when it is expressly waived in a writing filed with the probate court within said six months period, this provision for the surviving spouse shall apply with like effect (without formal renunciation) to cases where the wife or husband has made no devise or bequest to her husband or his wife, and also to cases where nothing passes by such devise or bequest. (Mar. 3, 1901, 31 Stat. 1376 ch. 854, § 1173; Apr. 19, 1920, 41 Stat. 567, ch. 153; Aug. 31, 1957, 71 Stat. 561, Pub. L. 85-244, § 6.)"

Title 18, Section 212, District of Columbia Code, 1961

"§ 18-212. Rights of surviving spouse if there is no renunciation.

"If the surviving spouse does not renounce as provided in section 18-211, she or he shall be entitled to receive the benefit of all provisions in her or his favor in the will of the deceased spouse and shall share, in accordance with section 18-101, 18-701, 18-702, 18-703 and 18-704, in any estate of the deceased spouse undisposed of by the will. (Mar. 3, 1901, 31 Stat. 1377 ch. 854, § 1174; Aug. 31, 1957, 71 Stat. 561, Pub. L. 85-244, § 7.)"

Title 30, Section 101, District of Columbia Code, 1961

"§ 30-101. Prohibitions—Marriage void ab initio.

"The following marriages are prohibited in the District of Columbia and shall be absolutely void ab initio, without being so decreed, and their nullity may be shown in any collateral proceedings, namely:

First. The marriage of a man with his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, mother, stepmother, wife's mother, daughter, wife's daughter, son's wife, sister, son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter.

Second. The marriage of a woman with her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father, stepfather, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's, son, sister's son.

Third. The marriage of any persons either of whom has been previously married and whose previous marriage has not been terminated by death or a decree of divorce. (Mar. 3, 1901, 31 Stat. 1381, ch. 854 § 1283.)"

STATEMENT OF THE CASE

On September 1, 1934, in Baltimore, Maryland, respondent, Anne Roberts Baker (hereinafter referred to as "respondent") was lawfully married to one Raymond Bein. Respondent and Raymond Bein lived as man and wife in the District of Columbia until May, 1944, when they separated. Respondent was employed in the Tax Division of the Department of Justice in the District of Columbia since March, 1937. During this period of time respondent and Raymond Bein never lived in Florida or any place other than the District of Columbia.

In October, 1944, respondent took annual leave from her job in the Department of Justice and went to Miami, Florida. In December, 1944, while still in Florida, she was transferred to an on-leave-without-pay status by the Department of Justice in the District of Columbia. Near the end of January, 1945, she consulted an attorney and on the 3rd day of February, 1945, she filed a Bill of Complaint for divorce from Raymond Bein in the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida, In Chancery No. 89623. Service of the Bill of Complaint was obtained upon Raymond Bein by publication and he never entered an appearance in that proceeding. On the 9th day of March, 1945, respondent testified before a Special Master in Chancery that she held a permanent position of employment in the State of Florida and intended to make Florida her permanent home. Based upon the aforesaid testimony, the Special Master in Chancery made a finding of fact that the Circuit Court for the Eleventh Judicial Circuit of Florida in and for Dade County had jurisdiction over the parties and the marriage *res*. On the 16th day of March, 1945, respondent was granted a final decree of divorce from Raymond Bein by the aforesaid Court and her maiden name was restored to her. On the 3rd day of April, 1945, respondent resumed her duties in the Tax Division in the Department of Justice in the District of Columbia and has thereafter continued to be a resident of the District of Columbia.

On the 22nd day of August, 1949, respondent and petitioners' decedent, Sophus Dee Hanson, obtained a marriage license and celebrated the rites of marriage in the District of Columbia. On the marriage license application respondent relied upon her 1945 Florida divorce decree as dissolving her prior marriage to Raymond Bein. On the 20th day of November, 1956, without any justification or excuse, respondent discontinued living with the decedent and departed from the marital home without his consent

and continuously lived separate and apart from him during the remainder of his lifetime. On the 5th day of February, 1957, Mr. Hanson executed a Last Will and Testament in which he made the following bequest:

> "2. I bequeath and devise to my *putative* wife, Anne Baker Bein Hanson—whose divorce obtained on March 16, 1945, from Raymond Bein in the Circuit Court, Miami, Dade County, Florida, was and is solely exparte, fraudulent and illegal, except in the State of Florida—the sum of $5.00 with the stipulation that if she in anywise contests this will, then she shall receive and take nothing hereunder."

Decedent left the residue of his estate to his only child, Barbara Elizabeth Hanson, a daughter by a prior marriage, a petitioner herein.

On the 22nd day of July, 1959, the Domestic Relations Branch of the Municipal Court for the District of Columbia granted Mr. Hanson an absolute divorce from respondent on the grounds of desertion. No appeal was taken from this decree. On the 10th day of January, 1960, 12 days before the said divorce decree became final, Mr. Hanson died.[1] The aforesaid Last Will and Testament was admitted to probate by the United States District Court for the District of Columbia, Holding a Probate Court, and Letters Testamentary were issued to Benjamin H. Saunders, the nominated executor, a petitioner herein. Thereafter, on the 19th day of July, 1960, respondent filed a renunciation of the bequest to her under the Will and requested payment of her intestate share as the decedent's widow in accordance with the provisions of Title 18, Section 211, of the District of Columbia Code.

The executor and daughter of the decedent opposed the renunciation and election of the putative widow and filed a

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[1] Title 16 Section 421, District of Columbia Code, 1961.

complaint for a declaratory judgment to determine her status and rights in the decedent's estate. On the 4th day of November, 1962, the District Court entered summary judgment in favor of respondent, wherein the Court determined that the executor and/or daughter of the decedent did not have the legal standing to demonstrate the invalidity of respondent's *ex parte* Florida divorce from her first husband. The District Court's opinion appears at 210 F. Supp. 377. The Court of Appeals affirmed on the basis of the District Court's opinion 327 F. 2d 889, — U.S. App. D.C. —, rehearing denied February 28, 1964.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions Under the Full Faith and Credit Provisions of the Constitution.

The District Court, in granting respondent's Motion for Summary Judgment, found that respondent's 1945 Florida divorce decree from her first husband was obtained in an *ex parte* proceeding wherein respondent's husband was neither personally served with process nor entered an appearance. There was no "participation" by the parties in the Florida Court which would have afforded the safe guards of due process of law on the jurisdictional requirements consistent with this Court's rulings in *Coe* v. *Coe*, 334 U.S. 378, 68 S. Ct. 1094, 92 L. Ed. 1451 and *Sherrer* v. *Sherrer*, 334 U.S. 345, 68 S. Ct. 1087, 92 L. Ed. 1429. Under these circumstances, the District Court believed that it had the power to review the question of whether the Florida Court had jurisdiction at the time of granting respondent's divorce and to refuse it full faith and credit, on the basis of *Williams* v. *North Carolina*, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, but declined to do so because the law of Florida would not permit the petitioners to make a collateral attack upon said decree, citing *Johnson* v. *Muelberger*, 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552, and *DeMarginy* v. *DeMarginy*, (S. Ct. of Florida) 43 So. 2d 442.

The Courts below fail to recognize and give effect to Title 30, Section 101, District of Columbia Code, 1961, which clearly permits the showing of a prohibited marriage in *any* collateral proceeding. The Courts assumed that the right to demonstrate the nullity of a marriage void *ab initio* is limited or restricted by the laws of some other jurisdiction. The statute, however, contains no such limitation, and, indeed, provides that such marriages, as in the instant case between petitioner's decedent and the respondent," . . . shall be void *ab initio* without so being decreed and their nullity may be shown in any collateral proceeding...."

The petitioners were entitled under the aforesaid Title 30, Section 101, to oppose respondent's election to take against the Will by demonstrating that her marriage to petitioners' decedent was prohibited because she was not legally divorced from her first husband at the time of marrying petitioner's decedent in the District of Columbia. Whether this showing might also constitute a collateral attack on respondent's Florida divorce decree is incidental, only, and should not proscribe petitioners' rights under Title 30, Section 101. This is substantially different from an attempt by a stranger to make a collateral attack upon a decree of a sister state. Here we are only concerned with opposing the claim of a putative widow who has elected to take against the Will and in effect is relying upon and seeking to enforce an invalid decree, the product of her fraud upon the Florida Court. This is clearly a collateral proceeding as contemplated by Title 30, Section 101. If the right to demonstrate the nullity of a prohibited marriage in the District of Columbia is dependent upon the laws of sister states governing collateral attacks upon its decrees, then the statute has lost its effect and purpose. Such a limitation obviously was not intended by Congress since it provided that prohibited marriages shall be void *ab initio,* without the necessity of being so decreed.

The marriage, void *ab initio* in the District of Columbia, does not become valid because the laws of Florida will not permit petitioner the right to question whether the Florida Court had jurisdicition at the time of granting respondent's divorce from her first husband. Assuming however that these proceedings constitute a collateral attack upon respondent's Florida divorce decree, the case of *State Ex Rel Willys* vs. *Chillingsworth*, 124 Fla. 274, 168 So. 249, clearly gives petitioner Barbara Elizabeth Hanson the right to question the validity of respondent's Florida divorce. Petitioners' standing to make this attack under the District of Columbia law is founded on *Sears* v. *Sears*, 110, U.S. App. D.C. 407, 293 F. 2d 884 and *De Parata* v. *De Parata*, (Mun. App. D.C.) 179 2d 723. *Johnson* v. *Muelberger*, supra, is easily distinguishable on its facts. The principles of res judicata extended to third party strangers to the Florida decree clearly are not applicable here. Also see, *Aiello* v. *Aiello*, 272 Ala. 505, 133 So. 2d 18.

II. The District of Columbia Divorce Decree Between Respondent and Petitioners' Decedent Was Not Abated by the Death of Petitioners' Decedent.

The Court below held that the divorce decree by the District of Columbia Court, dated July 22, 1959, granting petitioners' decedent a divorce from the respondent, abated by the death of petitioners' decedent 12 days before the expiration of six months from the date of the decree. Citing Title 16, Section 421, District of Columbia Code, 1961, and *Wesley* v. *Brown*, 90 U.S. App. D.C. 351, 196 F. 2d 859. However, Judge Burger, in the concurring opinion below demonstrated the fallacy of such interpretation of Section 421 and suggested that the Court re-examine the holding in *Wesley* v. *Brown*. Judge Burger points out that the legislative history of Section 421 shows that the purpose in requiring a six month period before a decree becomes final was to prevent the District of Columbia from becoming

a divorce mill. No provision was made for an *order nisi*, the usual means of providing for conditional-type divorce decrees. Under the existing language no further action or order is required to make the decree of divorce final. See, 79 Congressional Record 11587 (1935). Divorce statutes in many other jurisdictions become final upon entry or the expiration of the time for an appeal, with a specific prohibition against remarriage for a prescribed period of time. However, Courts in some jurisdictions have construed similar language to Title 16, Section 421 as meaning that the sole purpose of the six month waiting requirement is to prohibit remarriage only and that the decree takes effect the same as any other judgment. See cases cited in Footnote No. 4 to Judge Burger's concurring opinion below, infra p. 5a.

There is no plausible reason for the *Wesley* interpretation of Section 421. Public policy is not involved. It does not inure to the benefit of the parties nor to the administration of justice. It permits and perhaps requires an appeal within 30 days of the entry of the divorce decree, as a *final* order, *Roberts* v. *Roberts*, 95 U.S. App. D.C. 382, 222 F. 2d. 408; *Lort* v. *Lort*, 91 U.S. App. D.C. 118, 198 F. 2d 598, but refuses to give the *final* order any recognition if either party does not survive for six months thereafter. There is authority for the proposition that the statute was not intended to be applied so broadly. *Tillinghast* v. *Tillinghast*, 58 App. D.C. 107, 25 F. 2d 531 (1928); *Oliver* v. *Oliver*, 87 U.S. App. D.C. 334, 185 F. 2d 429 (1951); *Steele* v. *Steele*, 65 F. Supp. 329 (D.D.C. 1946).

Notwithstanding the holding that the divorce abated by the death of the petitioners' decedent prior to it becoming final, the Courts below held that the said divorce decree, reciting the marriage in the District of Columbia between respondent and petitioners' decedent on August 26, 1949, constituted res judicata and judgment by estoppel as to the validity or existence of said marriage. In other words,

the divorce decree was sufficiently *final* to accord the respondent the benefits of a final adjudication on the validity and existence of her marriage but had no final effect to dissolve her marriage. The decree should not be considered as binding and res judicata in some respects and a nullity in others.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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